LIM PENG SENG CONSTRUCTION SDN. BHD. v. SAFETY LIFE & GENERAL INSURANCE SDN. BHD.

[O.C.J. (Gunn Chit Tuan J.) September 8, 1986; January 19 & 23, 1987 and March 13, 1987]

[Kuala Lumpur – Civil Suit No. C1255 of 1982]

Insurance – Contractors' All Risks Insurance – Policy – Construction.

In this case the parties agreed that the issue for the decision of the court was whether on the true construction of the Contractors' All Risks Policy No. 1CAR/11/2012 together with the endorsements thereto appearing in pages 1 to 14 of the agreed bundle of documents, it was in force between August 16, 1981 and September 14, 1981.

The facts appear sufficiently in the judgment.

Held: (1) the policy in this case should be examined and construed as a whole;

(2) on a true construction of the policy as a whole as set out in the agreed bundle of documents, it was in force between August 16, 1981 and September 14, 1981.

[*Editorial Note:* In this case Mr. Sri Ram appeared for the defendant on September 8, 1986, and his brother Mr. Sri Kumar appeared on January 23, 1987 when the case was actually argued.]

CIVIL SUIT.

D. C. Alfred for the plaintiff.

Sri Ram and *Sri Kumar* for the defendant.

Cur. Adv. Vult.

Gunn Chit Tuan J.: On September 8, 1986, Mr. Alfred, counsel for the plaintiff, informed the Court that the parties would be agreeing on an issue to be put before the Court for its decision. He produced an Agreed Bundle of Documents which was marked "A" and the photostat copy of the defendant's Proposal form for Contractors' All Risks Insurance No. 1CAR/11/2012 which was marked "B". Counsel then stated that the issue for the Court's decision was as follows:

Whether on the true construction of the Contractors' All Risks Policy No. 1CAR/11/2012 together with the endorsements thereto appearing in pages 1 to 14 of Bundle "A", it was in force between August 16, 1981, and September 14, 1981.

Mr. Sri Ram, counsel for the defendant, confirmed that the above was the issue in this case and he also informed the Court that neither party would be calling witnesses and that all other defences raised were abandoned.

Counsel for the plaintiff then asked for an adjournment so that the parties could prepare and serve written submissions on each other. On January 19, 1987, Mr. Alfred, counsel for the plaintiff and also mentioning on behalf of Sri Ram & Co., for the defendant, asked for another adjournment as Mr. Sri Kumar, who was handling this matter for the defendant, was in Manila.

On January 23, 1987, Mr. Alfred addressed the Court first and merely referred to his written submission. He told the Court that the Contractors' All Risks Policy taken out by the plaintiff with the defendant was in compliance with a requirement of the contract for the construction of a sewerage system which the plaintiff had signed with Dewan Bandaraya Kuala Lumpur. The said contract is referred to in the Schedule to the said Policy and shown on page 8 of "A". The period of the insurance was originally from May 15, 1978, to November 14, 1981 (*vide* page 9 of "A"). By an endorsement shown on page 11 of "A" the period of insurance was amended to read from July 16, 1978, to January 15, 1982. It was therefore the submission of Mr. Alfred that it was clear that the period in question fell squarely within the period of cover provided by the said Policy. He also stated that there was no dispute as to the facts as can be seen from the pleadings filed in that the defendant in its statement of defence has stated in paragraph 1 thereof that "paragraphs 1 and 2 of the Statement of Claim are admitted." Again in paragraph 2 of the statement of defence the defendant has confirmed that it agreed to indemnify the plaintiff for damages ... *vide* Policy of Insurance No. 1CAR/11/2012 dated May 30, 1978, during the period of cover by the said policy. Again in paragraph 4 of the statement of defence, the defendant has admitted that on or about August 21, 1981, there occurred an incident involving the servants or agents of the plaintiff in the carrying out trench digging works alongside the main drain between Jalan Tiga and Jalan Empat off Jalan Chan Sow Lin, Kuala Lumpur.

It was the contention of Mr. Alfred that the period concerned was a period of actual construction within the period of cover and not during the period of maintenance. He also pointed out that the period of maintenance could only arise after the completion of the project and that it was clear that the said project had not been completed

on the relevant dates. He therefore submitted that the policy of insurance on its true construction was in force between August 16, 1981, and September 14, 1981.

Mr. Sri Kumar, counsel for the defendant, stated that one must distinguish between the period of actual construction and the period of maintenance. He referred to page 9 of the Bundle of Documents marked "A" and contended that the period of construction had ended on November 14, 1980. He also referred to the endorsement to the said Policy shown on page 11 of "A" and contended that the period of construction would have ended on January 15, 1981. He then referred to the endorsement shown on page 13 of "A" and contended further that the said Policy had lapsed in respect of the period of construction on August 15, 1981. Counsel lastly referred to the endorsement on page 14 of "A" and pointed out that the Policy was extended on September 15, 1981, and was therefore ineffective to cover the period referred to in the issue posed for the decision of the Court.

In his written submission, counsel for the defendant, had submitted that it was of critical importance to note that the period of risk and any extensions thereof included the 12-month maintenance period. According to him it was clear that the period of risk for actual construction work expired on August 15, 1981, and this period of risk was extended by another endorsement dated September 15, 1981, from January 16, 1982, to May 15, 1983. There was, therefore, according to him, a lapse of the subject policy of insurance resulting in the lack of insurance cover for actual construction work for the period August 15, 1981, to September 15, 1981. As the accident giving rise to third party claims occurred on August 21, 1981, it was counsel's submission that the defendant was clearly not on risk as there was no cover for actual construction for the period of August 16, 1981, to September 15, 1981.

In his reply Mr. Alfred referred to paragraph 1 of the statement of claim wherein it was averred that "the plaintiff is a limited company having its principal place of business at 3-1 Jalan Genting Kelang, Setapak, Kuala Lumpur and was at all material times carrying out works in connection with the Kuala Lumpur Sewerage project." He again referred to paragraph 1 of the statement of defence wherein it was pleaded that "Paragraphs 1 and 2 of the Statement of Claim are admitted." He therefore contended that it was admitted in the pleadings that the plaintiff was at all material times carrying out works in connection with the said Sewerage project.

Counsel then referred to page 1 of the Agreed Bundle of Documents marked "A" concerning the period of cover and pointed out that it was stated that "the insurers' liability expires for parts of the insured contract works taken over or put into service." He then pointed out that the contract works had not yet been taken over or put into service on the relevant dates referred to in the issue before the Court.

Mr. Alfred then referred to page 14 of the Agreed Bundle of Documents marked "A" and contended that even accepting the defendant's contention that the period of construction would have ended on May 15, 1982, the said Policy covered August 21, 1981. His final contention was that the dates of issue of the endorsements were not important but that what mattered was whether the period of insurance cover was extended.

With respect I could not agree with the contention of Mr. Sri Kumar as I did not consider that the said Policy should be truncated and each endorsement thereto examined and construed separately. I therefore rejected his first contention that the period of construction ended on November 14, 1980, because of the endorsement shown on page 9 of the Agreed Bundle of Documents marked "A". I also rejected the contention that the period of construction would have ended on January 15, 1981 because of the endorsement shown on page 11 of "A". In my view the said Policy should be examined and construed as a whole and it is quite obvious that the said Policy was extended to and did not expire until May 15, 1983 (page 14 of "A"). When the said Policy is examined as a whole it will be found that the original period of insurance was from May 15, 1978, to November 14, 1981. The endorsement on page 11 of "A" amended the period of insurance from July 16, 1978, to January 15, 1982. The next endorsement shown on page 13 of "A" extended that period of insurance from January 16, 1982 to August 15, 1982. In other words, there was no lapse in the period of cover after the previous expiry date on January 15, 1982, shown on page 11 of "A". Finally, the endorsement on page 14 of "A" extended the period of insurance from January 16, 1982, to May 15, 1983. It is true that the last endorsement was issued on September 15, 1981, *i.e.* one day after the period referred to in the issue posed for the Court's decision. But the impor-

tant fact was that there was no lapse in the period of cover which did not expire until May 15, 1983, and the last endorsement was made during the period of the insurance cover itself. Taking into account that there is a 12-month maintenance period (vide page 9 of the Agreed Bundle of Documents marked "A") the period of construction, therefore, only expired in this case on May 15, 1982, and therefore covered the relevant dates. Even without adopting the *contra proferentum* rule, I therefore concluded that on a true construction of the said Policy as a whole as set out in pages 1 to 14 of "A", it was in force between August 16, 1981, and September 14, 1981. Having answered the question posed for the decision of the Court, I forgot to award costs against the defendant which I should have done.

Order accordingly.

Solicitors: *Sangara & D.C. Alfred; Sri Ram, Zulkifly & Kumar.*

HUP BEE SENG (sued as a firm) v. DR. NG TENG KOK & 4 ORS.

[A.C.J. (Edgar Joseph Jr. J.) April 14, 1987]

[Penang – Civil Appeal No. 11-7-82]

Practice and Procedure – Parties – Action for recovery of possession – Change of ownership of premises at date of hearing – Whether the new owner should be substituted as the proper plaintiff – Locus standi of party – S.C.R. 1980, O. 8.

Landlord and Tenant – Change of ownership at date of hearing – Whether the new owner should be substituted as the proper plaintiff – Locus standi of party – S.C.R. 1980, O. 8.

In this case the tenant of certain premises appealed against the judgment of the learned Magistrate who gave possession of the premises to the plaintiffs. The plaintiffs were the owners of the premises at the date when the summons was issued. However, at the date of hearing the ownership had been transferred to an incorporated company in which the plaintiffs were shareholders. The issue before the present court was whether the incorporated company should have been substituted as the proper plaintiff.

Held, allowing the appeal: (1) in an action for recovery of possession of immovable property the proper plaintiff is the person now entitled to immediate possession of the property. He may be either the registered proprietor or only a tenant. If there be no tenancy created by, or otherwise binding on the registered proprietor, then his ownership involves the right to present possession and where there is more than one owner all should be joined as plaintiffs;

(2) therefore in the present case where the action for possession of immovable property had been correctly commenced in the names of the registered proprietors but by the date of the hearing the interest in the subject matter had devolved upon some other person, the latter is entitled to apply that he be made the party to the action and the proceedings be carried on as if he had been substituted for the original party;

(3) in the circumstances of the present case, the plaintiffs were not the registered proprietors of the premises and were therefore not entitled to immediate possession. The right to sue was thus not legally vested in them at that moment. It was vested in the incorporated company concerned which ought to have been substituted as the proper plaintiff;

(4) the orders for possession and *mesne* profits should be set aside.

Cases referred to:

(1) *Performing Right Society Ltd.* v. *London Theatre of Varieties Ltd.* [1924] A.C. 1.
(2) *Walter & Sullivan Ltd.* v. *J. Murphy & Sons Ltd.* [1955] 2 Q.B. 584.
(3) *Sivagami Achi* v. *P. Rm. Ramanathan Chettiar & Anor.* [1959] M.L.J. 221.
(4) *Public Trustee* v. *Elder* [1926] Ch. 776, C.A.
(5) *Attorney-General* v. *Garner* [1907] 2 K.B. 480, 487.
(6) *Mitchell* v. *Tarbutt* (1794) T.R. 649, 651; 101 E.R. 362.
(7) *Lauri* v. *Renad* [1892] 3 Ch. 402.
(8) *Howard* v. *Howard* (1892) 30 L.R. Ir. 340.

MAGISTRATE'S APPEAL.

Yeap Ghim Guan for the appellant.
Murad bin Abdul Aziz for the respondents.

Cur. Adv. Vult.

Edgar Joseph Jr. J.: This was a tenant's appeal from the judgment of the learned Magistrate, George Town, giving possession of a stall No. 96 comprised in premises 257, Penang Road popularly known as the Penang Bazaar ("the premises") to the plaintiffs who were the owners thereof at the time of the expiry of the notice to quit and the issue of the summons but not at the date of the hearing for, by then, it had been transferred to an incorporated company in which they were shareholders. In these circumstances, at the hearing counsel for the plaintiffs in the Court below made oral application to add the incorporated company as a co-plaintiff but the learned Magistrate "decided to proceed with the hearing with the original